BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

City of Anacortes,

Petitioner,

v.

Skagit County and Washington State Department of Ecology,

Respondents.

Case No. 07-2-0003

ORDER DISMISSING PETITION FOR REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION

This Matter comes before the Board upon the Department of Ecology's Motion for Summary Judgment, filed with the Board on April 5, 2007 and Skagit County's Motion for Summary Judgment filed with the Board on April 6, 2007.[1] A response from the City of Anacortes was filed with the Board on April 6, 2007.

The Board conducted a hearing on the motions on May 1, 2007 in Mount Vernon, Washington. All three Board members attended, James McNamara presiding. Mary Sue Wilson appeared on behalf of the Washington State Department of Ecology (Ecology). Joseph Mentor, Jr. appeared on behalf of Skagit County (County). Ian Munce and Joseph Brogan appeared on behalf of the City of Anacortes (City).

Having reviewed the motions, the Petition for Review, and the files and records herein, the Board finds that the January 22, 2007 Interlocal Agreement between Ecology and the County ("ILA") is neither a *de facto* comprehensive plan amendment, nor a development regulation. Therefore, the Board does not have jurisdiction to hear an appeal challenging the adoption of this agreement. Accordingly, this appeal is dismissed.

[1] Skagit County's Motion for Summary Judgment was filed one day after the deadline for dispositive motions.

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I. PROCEDURAL BACKGROUND

In late 2006, the City, PUD #1 of Skagit County, the County, the Upper Skagit Indian Tribe, the Swinomish Tribal Community, the Sauk-Suiattle Indian Tribe, Ecology, and the Washington State Department of Fish and Wildlife entered into a Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes ("1996 MOA"). The stated purposes of this 50 year agreement are: a) to ensure the establishment of instream flows to protect fisheries resources, and the mitigation of any interference with such established flows; b) to provide a mechanism for the coordinated management of water resources in areas described by the Skagit County Coordinated Water System Plan, Regional Supplement, July 1993 ("CWSP") to meet the out-of-stream needs of the Swinomish Indian Tribal Community, Upper Skagit River Tribe, and Sauk-Suiattle Indian Tribe, local governments, and public water purveyors within Skagit County; c) to avoid litigation or adjudication of water resources within the Skagit River Basin between the parties to the agreement; d) to assist in expediting Ecology's water right decision-making within the CWSP service area; and e) to modify the CWSP to conform to the agreement and to incorporate the agreement into the City of Anacortes' and PUD #1 of Skagit County's Joint Operating Agreement.[2]

In 2001 Ecology adopted Chapter 173-503 WAC, the Skagit Basin Instream Flow Rule.[3] Skagit County appealed the Instream Flow Rule to Thurston County Superior Court. Following settlement discussions between the County and Ecology, Ecology agreed to adopt an amendment to the Instream Flow Rule, in return for which the County agreed to dismiss its appeal, and to make a good faith effort to implement the Instream Flow Rule.[4] In January of 2007, the County and Ecology entered into the Skagit River Basin Instream Flow Implementation Agreement ("ILA"). Among the recitals of that agreement is that the County and Ecology would seek to exercise their respective regulatory authority in a

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[2] Petition for Review, Exhibit A.
[3] City's Summary Judgment Reply Brief at 4.
[4] Skagit County's Motion for Summary Judgment, at 3.

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coordinated and complementary fashion.[5] Specifically, the parties agreed to work together on compiling data that will inform implementation decisions,[6] to consult with each other on the management of reservations,[7] to consult with interested parties on the accounting of water use under reservation[8], and to consult with each other on development of mitigation guidelines and plans.[9]

In February of 2007, the City filed a Petition for Review seeking to invalidate the ILA on the grounds that its terms violated the GMA, the County's comprehensive plan, CWSP and the 1996 MOA.[10]

Pending Motions

The City has submitted motions to strike extra-record evidence.[11] The first motion, included in the City's response to the motions for summary judgment, objected to the declarations included with the County and Ecology's motions. The Declarations of Gary Christensen and Peter Browning submitted by the City recount the County's current process of amending the County's Critical Areas Ordinance (Christensen Declaration) and Drinking Water Code to implement the Instream Flow Rule. Neither is of relevance to the issue of whether the 2007 ILA is a *de facto* comprehensive plan amendment or development regulation. Consequently, such evidence would not be "necessary or of substantial assistance to the board in reaching its decision" and will not be admitted. WAC 242-02-540.

Ecology has submitted the Declaration of Dan Swenson in support of its motion for summary judgment. At the hearing on the motion, Ecology moved for its admission. Mr.

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[5] January 22, 2007 Interlocal Agreement, at section 1.4.
[6] Ibid. at §§3.1- 3.5; 6.1-6.3.
[7] Ibid. at §5.2.
[8] Ibid. at §4.3.
[9] Ibid. at §§7.1-7.2.
[10] Petition for Review, at 2.
[11] City of Anacortes' Response to Skagit County and Ecology Motions for Summary Judgment and Motion to Strike Extra Record Evidence and City of Anacortes' Motion to Strike Portions of County's Response and Extra-Record Evidence.

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Swenson's declaration sets out a history of Ecology's water resources activities in the Skagit River Basin. To that extent, we find it of substantial assistance to the board in reaching its decision, and grant Ecology's motion for its inclusion.

The second motion objects to the County's inclusion of the County's Motion for Reconsideration in *Swinomish Indian Tribal Community v. Skagit County*, a Court of Appeals Division I case, as Exhibit A to its Response to City of Anacortes' Motion to Supplement the Record. We do not find that this document would be necessary or of substantial assistance to the board in reaching its decision, therefore we shall not consider that material. WAC 242-02-540.

Post-Hearing Matters

Following the Hearing on the Motions for Summary Judgment, the County submitted a letter to the Board providing additional information on the requirement, as set out in Section 3.3 of the 2006 Settlement Agreement, that the County would require installation of water meters for all new or expanding public water systems.[12] The City objected to this submission, noting correctly that this material was not requested by the Board at the hearing. Accordingly, the Board will not consider argument contained in the unsolicited post-hearing submissions.[13] Nevertheless, the Board may take notice of existing provisions of state law. Here, the County cites two provisions, WAC 246-290-496 and 173-173-040, as requiring metering of new sources. While the City notes that WAC 246-290-496 was not effective until after the execution of the Ecology/City Settlement Agreement, WAC 173-173-040 was effective 1/21/02. Therefore the Board will take notice of WAC 173-173-040 as an existing requirement at the time the parties entered into the 2007 ILA.

[12] Letter of May 4, 2007 from Joe Mentor, Jr.
[13] Letter of May 7, 2007 from Joseph A. Brogan.

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II. ISSUE ON MOTIONS

On motions, the issue for the Board is:

> Does the Board have jurisdiction over the petition for review based on the 2007 ILA as a *de facto* comprehensive plan amendment or development regulation?

III. BURDEN OF PROOF AND STANDARD OF REVIEW

Although denominated as motions for summary judgment, the motions of Ecology and the County are more properly seen as motions to dismiss for lack of jurisdiction.[14] A growth hearings board, just as any other tribunal, must have subject matter jurisdiction in order to render a decision in a case. (See *Marley v. Department of Labor and Industries,* 125 Wn.2d 533, 886 P.2d 189(1994) - "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.")

Where the adoption challenged in a petition for review is a comprehensive plan, development regulation or amendment to either, it is plain that the Board has jurisdiction.[15] However, when a petitioner alleges that an agreement or other official document is a *de facto* comprehensive plan amendment or development regulation, the burden is on the petitioner to demonstrate that the document does in fact constitute a *de facto* comprehensive plan amendment or development regulation. While the GMA does not directly address the burden of proof in establishing jurisdiction, the obligation to establish jurisdiction is implicitly upon the petitioner(s) because the overall burden of proof is on the petitioner(s):

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[14] Summary judgment is not available in board cases because the facts are already established through the record of the local jurisdiction. See, *Hood Canal Coalition v. Jefferson County,* WWGMHB Case No. 03-2-0006 (Order on Motions, 5/21/03) The evidence before a board comes from the record before the local jurisdiction, supplemented by other evidence if "necessary or of substantial assistance to the board in reaching its decision". RCW 36.70A.290(4). Given the expedited nature of board proceedings under statutory deadlines, only certain limited issues are typically decided on pre-hearing motions. Jurisdiction is one of them.

[15] RCW 36.70A.280(1)(a)

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> Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

RCW 36.70A.320(2)

The City's Petition for Review in this case is based on the argument that the Board has jurisdiction to review the 2007 ILA as a *de facto* comprehensive plan amendment or development regulation. Unless a petition alleges that a comprehensive plan, a development regulation, or amendments to either violate the GMA, the Board does not have subject matter jurisdiction to hear the petition.[16]

To determine whether or not the action that the County took in entering into an agreement with Ecology constitutes a comprehensive plan amendment, we must determine if the agreement has the same effect as a comprehensive plan amendment.

While the term "comprehensive plan amendment" is not specifically defined by the GMA, the term "comprehensive plan" is defined:

> The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

RCW 36.70A.070

To determine the meaning of the term "amendment" in the GMA, in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. *Fraternal Order of Eagles v. Grand Aerie of Fraternal Order of Eagles*, *Washington State Ass'n,* 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *see also HJS Dev., Inc. v. Pierce County,* 148 Wn.2d 451, 479, 61 P.3d 1141 (2003) (without a statutory definition, courts employ the dictionary definition); *Thurston County v. Cooper Point Ass'n.,* 148 Wn.2d

[16] *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

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1, 12, 57 P.3d 1156 (2002) (upholding the Board's interpretation of "necessary" as consistent with the dictionary definition). Reference to a standard dictionary gives us the following definitions: "Amend" is "to alter, modify, rephrase, or add to or subtract from (a motion, bill constitution, etc.) by formal procedure". *The Random House Dictionary of the English Language, The Unabridged Edition.* An "amendment" is defined as:

> 1. the act or state of amending or being amended,
> 2. an alternation of or addition to a motion, bill,
> constitution, etc.
> 3. a change made by correction, addition, or deletion.[17]

A comprehensive plan amendment is therefore a change which alters, modifies, rephrases, adds to or subtracts from the comprehensive plan.

This Board has found that a legislative action may constitute a comprehensive plan amendment even if it was not adopted as one. In *Skagit County Growthwatch v. Skagit County and Day Creek Sand and Gravel,* WWGMHB Case No. 04-2-0004 (Final Decision and Order, August 20, 2004), the Board found that a change to a designation on a comprehensive plan map constituted a comprehensive plan amendment because it altered a plan map, even though the county in that case had considered it to be an administrative correction.

More recently, the Court of Appeals determined that an agreement may be a *de facto* comprehensive plan amendment where, under its terms, the agreement allows something that was previously forbidden by the comprehensive plan. *Alexanderson v. Clark County*.[18] In that case, Clark County entered into a Memorandum of Understanding (MOU) with the Cowlitz Indian Tribe that required the County to provide water to the Tribe's land if it was placed in trust status, despite provisions to the contrary in the County's comprehensive plan. The Court there found that certain language of the MOU, while not explicitly amending the

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[17] *Ibid.*
[18] 135 Wn.App. 541, 144 P.2d 1219 (2006).

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Comprehensive Plan, had the "actual effect of doing so" and that that MOU "supercedes and amends the comprehensive plan" because it would allow the Tribe to use the land in a manner inconsistent with the current land use designation.[19] The Court noted that because the MOU explicitly supplied water to the subject land in violation of the comprehensive plan, it was a *de facto* plan amendment. As the Court noted, "what was previously forbidden is now allowed". [20]

While the Court in *Alexanderson* did not explicitly state what is required for an agreement to constitute a *de facto* comprehensive plan amendment, it held the petitioners in that case to a high standard. The Court did not rely upon the GMA terms of "consistency" or "inconsistency". Instead, the Court articulated a standard for finding a *de facto* comprehensive plan amendment that appears to be even more stringent. For an agreement to "effectively" amend a comprehensive plan under the *Alexanderson* standard, it is not enough that it be merely "inconsistent" with the plan. It must clearly and directly supercede a plan provision so that "what was previously forbidden is now allowed."

The distinction between an "inconsistency" and an "effective amendment" is important. If any inconsistency between an agreement and a comprehensive plan confers jurisdiction upon the boards, then the requirement that the comprehensive plan must be an internally consistent document would extend board jurisdiction to all agreements that address subjects also addressed in the comprehensive plan.[21] This is a potentially enormous class of agreements and such a reading of *Alexanderson* would expand the statutory grant of jurisdiction to the boards well beyond its own clear terms.[22]

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[19] Ibid. at 549.
[20] Ibid. at 550.
[21] RCW 36.70A.070
[22] RCW 36.70A.280, 36.70A.290; see also, *Wenatchee Sportsmen v. Chelan County,* 141 Wn.2d 169, 178, 4 P.3d 123, 2000 Wash. LEXIS 472 (2000) ("…unless a petition alleges that a comprehensive plan or development regulation, or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.")

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"Consistency" is a requirement that has been well-developed in the interpretation of the GMA. The Minimum Guidelines[23] state:

> The act calls for "consistency" in a number of contexts. In general, the phrase "not incompatible with" conveys the meaning of "consistency" most suited to preserving flexibility for local variations. An important example of the use of the term is the requirements that no one feature precludes the achievement of any other.

WAC 365-195-070(7)(in pertinent part).

We find, therefore, that a *de facto* comprehensive plan amendment must do more than create an inconsistency between the agreement and the plan. It must actually force or prohibit action in direct contrast with a plan policy directive.

Similarly, a *de facto* development regulation is a legislative enactment that has the same effect as a development regulation. In the GMA, the term "development regulation" is defined:

> "Development regulation" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

RCW 36.70A.030(7)

Typically, development regulations are codified once they are adopted because they apply generally.

In *Servais v. City of Bellingham,* [24] the Board found that a memorandum of agreement (MOA) between the City of Bellingham and Western Washington University was an amendment to the City's development regulations as that term is defined in RCW 36.70A.030(7). The Board reached this conclusion because the MOA changed the

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[23] Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas, Ch. 365-195 WAC

[24] 00-2-0020, (Final Decision and Order, October 26, 2000).

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application of the zoning code in areas of the campus, modified certain city code provisions as to the campus, and created exemptions to certain other code provisions for the campus:

> The legal effect of those modifications is an amendment to the zoning code within the confines of the WWU campus.[25]

On the other hand, an agreement to adopt development regulations is not itself a development regulation. See, *City of Burien v. Central Puget Sound Growth Management Hearings Board,* 113 Wn.2d 375, 53 P. 3d 1028 (2002), Thus, to be a *de facto* development regulation, the agreement must have the same effect as an official control and not merely constitute an agreement to adopt regulations in the future.

We will consider whether the 2007 ILA constitutes either a *de facto* comprehensive plan amendment or a *de facto* development regulation in light of these principles.

IV. DISCUSSION

Position of the Parties

The City takes the position that the ILA is an amendment to the County's comprehensive plan, arguing that it supersedes and amends elements of the plan and directs the County and Ecology to act inconsistently with the plan.[26] In particular, the City argues that the ILA amends the County comprehensive plan policies because it disregards the requirement for the County to act consistently with the comprehensive plan, CWSP, Anacortes Fidalgo Island Coordinated Water System Plan, and the 1996 MOA.[27] Entering into the ILA violates provisions of the ILA that committed the County to work collaboratively, not unilaterally, in pursuit of water resource planning, the City maintains.

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[25] *Ibid.*
[26] City's Summary Judgment Response Brief at 2.
[27] Ibid. at 10.

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The City also argues that the ILA adopts development regulations that are inconsistent with GMA's procedural requirements and the comprehensive plan. The City points to sections 5.2, 7.1 and 7.2 of the ILA and section of 3.3 of the Settlement Agreement as new controls placed on development in the County.[28]

The Respondent Department of Ecology argues that the 2007 ILA is neither a *de facto* comprehensive plan amendment nor a *de facto* development regulation. Ecology maintains that nothing in the 2007 ILA requires the County to act in a manner inconsistent with County planning policies – a requirement in order to find a *de facto* comprehensive plan amendment. Ecology argues that the City's assertion of jurisdiction relies upon three false premises: 1) that the 1996 MOA and the CWSP prevent Ecology and the City from exercising their authority without the approval of other entities, including the City; 2) that if a topic associated with water resources planning has not been addressed in the County comprehensive plan it cannot be independently addressed by Ecology or the County; and 3) that the City mischaracterizes Ecology's role in applying the Instream Flow Rule (IFR).

As to the first assertion, Ecology maintains that there is nothing in either the 1996 MOA or the CWSP that would require Ecology or the City to first obtain the approval of the City before taking action in the area of water resource management. Ecology claims to have met all of its requirements in the MOA when it spent more than three years attempting to reach agreement among all the MOA parties on a revised Instream Flow Rule. Further, Ecology claims that any language in the MOA that would require Ecology to seek the approval of another jurisdiction before adopting or implementing the Instream Flow Rule would be *ultra vires* (beyond the lawful authority of the agency), and therefore unenforceable.

[28] Ibid. at 20-21.

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Ecology next argues that the County's comprehensive plan did not "occupy the field" of water policy activity. It argues that not only did the plan not make such a claim, but any attempt to exclude other parties from independent action would be unenforceable.

Finally, Ecology argues that it is its Instream Flow RUle that provides for mitigation plans as a condition for certain building permits, and the IFR that dictates closure of basins once water reservations are used up. Such requirements are state regulations, not *de facto* County development regulations, Ecology asserts, and therefore are subject to challenge in Superior Court, not before the Growth Management Hearings Boards.

Skagit County's position is substantially the same as that taken by Ecology. It challenges the Board's jurisdiction to review a matter it asserts is neither a comprehensive plan amendment nor a development regulation.

The County argues that the ILA is not a *de facto* amendment of the County comprehensive plan because it is not inconsistent with the plan, and the Board has subject matter jurisdiction over an interlocal agreement only if it is directly inconsistent with the county's comprehensive plan. Instead, the County argues, the 2007 ILA is a procedural agreement to undertake amendments to the County's comprehensive plan in order to implement the IFR.

The County further argues that the ILA is not a *de facto* development regulation because, rather than establishing land use regulations, it is, as stated, a procedural document that establishes the agreement of the parties to best support the IFR.

Board Discussion

In examining the ILA to determine whether it constitutes a *de facto* comprehensive plan amendment or development regulation, we first note a distinction between the claims as to the County and those as to Ecology. Ecology is alleged to have violated RCW 36.70A.103 – requiring state agencies to comply with local comprehensive plans and development

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regulations – and Ch. 43.21C RCW – SEPA's procedural requirements.[29] However, if the 2007 ILA is a *de facto* amendment, it must have been accomplished by the County since only the County could have amended its own comprehensive plan and/or development regulations.

The City argues that the CWSP, 1996 MOA and the Joint Operating Agreement are all part of the County's comprehensive plan and that they establish the joint governance structure for the regional public water supply and functional plan. [30] The City urges that the ILA (Section 5.2) effectively amends the CWSP to change the governance structure established by Section 7.3 of the CWSP.[31] Further, the City argues, Section 5.3 of the ILA creates a new multi-agency body (the Skagit County Water Resource Advisory Committee) which supplants the Water Utility Coordinating Council (WUCC), something which is inconsistent with Section 1 of the CWSP.[32] In addition, the City claims that the ILA establishes a change in how the Instream Flow Rule applies in Skagit County in conflict with the 50-year MOA process by which instream flow conditions are determined and set.[33]

The City also argues that the ILA contains development regulations that are inconsistent with the CWSP.[34] The City urges that Section 5.2, Section 7.1 and 7.2 of the ILA and Section 3.3 of the Settlement Agreement adopt development regulations by placing controls on development and/or land use activities. [35]

We will consider the assertions concerning a *de facto* comprehensive plan amendment first; and then the assertions concerning *de facto* development regulations.

<u>*De Facto* Comprehensive Plan Amendment Claims</u>

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[29] Petition for Review, Detailed Statement of Issues 8.6, 8.7 and 8.10.
[30] City's Summary Judgment Response Brief at 15.
[31] *Ibid.* at 17.
[32] *Ibid.*
[33] *Ibid.* at 19.
[34] *Ibid.* at 20.
[35] *Ibid.* at 20-21

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As a general matter, the City asserts that ILA amends the comprehensive plan because the 1996 MOA bound all parties to collaborate and not to unilaterally pursue water agreements that conflict with comprehensive plan agreements and policies.[36]

At oral argument, the City presented two charts, one comparing the ILA to the 1996 MOA, and the other comparing the ILA to the CWSP with a listing of "ILA Inconsistencies". Many of these inconsistencies turn upon the fact that the ILA contains provisions not expressly contemplated in the 1996 MOA (eg. "ILA Creates County-Run Skagit River Mainstream Advisory Committee"; "ILA Directs County-led Studies and Management Responses having measurable impact on flows in the Skagit River") or take exception to the fact that the ILA does not address all areas considered in the 1996 MOA (eg. "ILA Only Recognizes Ecology and Excludes Purveyors, Tribes & Other Stakeholders").[37]

To the extent that the City's position is that the 1996 MOA, the CWSP, the Joint Operating Agreement "occupy the field" of water resource planning in Skagit County (as stated by Ecology), we find that the City cannot rely upon an argument that the alleged *de facto* plan amendment contradicts the general philosophy of the comprehensive plan. There is no *de facto* comprehensive plan amendment unless the express terms of the comprehensive plan documents are directly contradicted.[38] Therefore, the ILA does not effectively amend the plan unless it supercedes one of its provisions and allows something which was prohibited before, or vice versa.

The City's major contention is that Section 5.3 of the ILA violates and amends Section IV(G)(4) of the MOA. Section 5.3 of the ILA provides that the County will establish "an advisory committee on the use of water under the Skagit River mainstem and sub-basin management units, and on other water resource issues in the Skagit River basin." It goes

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[36] City's Response Brief at 11.
[37] Document entitled "Binding GMA Requirements 1996 MOA vs. ILA")
[38] Ecology's Motion for Summary Judgment at 13.

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on to provide that the advisory committee will include representatives from "water purveyors, local governments and special purpose districts, affected Indian tribes, and other interested parties."

The City points to Section IV(G)(4) of the MOA as establishing the body that will "guide the development, review and approval of Skagit River Watershed Management strategies":

> The Skagit River Flow Management Committee (SRFMC) shall be responsible for identifying and recommending studies and management responses, and in guiding the development, review, and approval of Skagit River Watershed Management strategies for the signators to this Agreement related to activities that have a measurable impact on the flow in the Skagit River while taking into consideration previously settled hydroelectric agreements…

Under the CWSP, this committee became the Skagit County Water Utility Coordinating Council (WUCC). By adopting the MOA into its comprehensive plan, the County included its terms as the "mechanism for the coordinated management of water resources in areas described by the [CWSP] to meet the out-of-stream needs of the Swinomish Indian Tribal Community, Upper Skagit River Tribe, and Sauk-Suiattle Indian Tribe…local governments, and public water purveyors within Skagit County."[39]

Comparing these two sections, we do not find that the ILA necessarily supercedes MOA IV(G)(4). It has not been demonstrated either that the County has abandoned its commitment to participate in the WUCC or that Anacortes will not be invited to participate as a member of the Advisory Committee. On the face of the two agreements, there is no necessary conflict between the two provisions.

Moreover, it is premature to suggest that the Section 5.3 Advisory Committee "supplants the WUCC."[40] Section 5.3 does not specify who will be on the Advisory Committee except to state that it will include "representatives from Skagit Basin water purveyors, local

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[39] MOA, I.B - Purpose of Agreement
[40] City's Summary Judgment Response Brief, at 17.

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governments and special purpose districts, affected Indian tribes, and other interested parties." By the terms of this section, it will not be established until July 1, 2007 and the County has asserted its willingness to have the City participate on the Advisory Committee.

We also note that the ILA specifically "reaffirms" the 1996 MOA.[41] Rather than evidencing an intent to amend or supercede the MOA, the ILA expressly acknowledges its continuing effect. This provision indicates that the County remains committed to be bound by the terms of the MOA as a component of its comprehensive plan and that the ILA is to be read in harmony with the MOA.

The City argues that "Section 5.2 of the ILA dictates how Ecology and the County will work together unilaterally, and without the input of any other party in the basin, including purveyors and the WUCC, to determine when reservations in the State Rule have been utilized and when basins are subject to closure."[42] While the City alleges that the ILA, in effect, amends the CWSP with its own two-agency governance structure[43], this is not the case. Section 5.2 recites that Ecology will determine when a reservation limit has been fully utilized and is subject to closure. The fact that it also provides that "Before closing or reopening any subbasin, Ecology will consult with Skagit County on such actions" is not in conflict with any provision of the County Comprehensive Plan. The City does not cite any provision of the Plan that would forbid such consultation. In fact, the City conceded at the hearing on this motion that regardless of the consultation process set out in Section 5.2, the decision on basin closure remains Ecology's, consistent with state law. Consultation with Skagit County, as set out in Section 5.2, is not inconsistent with and does not foreclose the collaboration the parties to the 1996 MOA agreed to.[44] The City would have the Board rule that any additional collaboration among the parties not contemplated in 1996 is forbidden as

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[41] Section 8.3
[42] City's Summary Judgment Response Brief, at 16.
[43] Ibid. at 17.
[44] See, Section IV. G. 1. a. of the 1996 MOA.

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an amendment to the County Comprehensive Plan. The evidence does not support such an interpretation.

The City takes exception to Section 6.3 of the ILA which provides that the County and Ecology will jointly fund a USGS study on groundwater in the Skagit River Basin because "no process is set forth for input for purveyors concerning re-mapping such basins."[45] Again we find that this argument assumes rather than proves a conflict. The absence of a provision for such a process does not mean there will not be one. Under the standard for showing a *de facto* comprehensive plan amendment, there must be a direct and express conflict between the comprehensive plan and the alleged *de facto* amendment. The City has not shown that here.

Finally, the City alleges that Section 8 of the ILA "sets forth fundamental changes to agreements and policies agreed to in the CWSP".[46] Specifically, the City points to Section 8.1 which recites that the County and Ecology intend the 2006 Settlement Agreement "to provide specific details on the commitments in the Settlement Agreement to implement the Skagit Instream Flow Rule."[47] Yet a commitment by the County to honor prior agreements is not an amendment of other adopted documents, such as the comprehensive plan. The City has failed to show how the terms of the Settlement Agreement, or the County's commitment to adhere to that Agreement, constitute a *de facto* amendment to the County's Comprehensive Plan. In fact, the remaining two sections of Section 8, which the City alleges sets forth "fundamental changes" to the CWSP are merely a document sharing agreement (8.2) and a reaffirmation of the 1996 MOA. (8.3)

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[45] Petition for Review, at section 7.1.11.
[46] City's Summary Judgment Response Brief, at 18.
[47] 2007 ILA, at Section8.1.

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De Facto Development Regulations

The City further argues that the ILA contains development regulations that are inconsistent with the CWSP.[48] In particular, the City points to Section 5.2 of the ILA that provides:

> "Upon a basin closure, any land use or building permit application requiring a determination of water availability will be approved by Skagit County only if the applicant satisfies the mitigation requirements of the Skagit County Code, the Instream Flow Rule, and other applicable law."[49]

The City fails to provide argument to support the contention that this constitutes a development regulation, save to assert that it is "clearly a development regulation"[50] but instead focuses its argument on the point that, pursuant to RCW 36.70A.370(2), counties are to utilize a process developed by the Attorney General to ensure that regulatory and administrative actions do not result in unconstitutional takings of property.[51] The City points out that there is no indication in the record that any such review was undertaken prior to the execution of the ILA. But this argument presumes what the City has not demonstrated – that this provision is a development regulation.

In the GMA, the term "development regulation" is defined:
"Development regulation" or "regulation" means the controls placed on development or land use activities …" RCW 36.70A.030(7) (in pertinent part).

Section 5.2 of the ILA is not a development regulation. In order to constitute "controls placed on development or land use activities", a development regulation must bind the parties subject to it, i.e. permit applicants. The ILA is not itself a codified regulation of the County and therefore, does not control development or land use activities in Skagit County. Instead, as Ecology points out, it is Ecology's existing Instream Flow Rule that provides for mitigation plans. See, WAC 173-503-060(2)(c). And it is the existing Instream Flow Rule,

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[48] City's Summary Judgment Response Brief, at 20.
[49] 2007 Interlocal Agreement, at Section 5.2.
[50] City's Summary Judgment Response Brief at 20.
[51] Ibid. at 21.

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at WAC 173-503-051, that provides for closure of basins to future use once reservations are used up. Thus Section 5.2, as well as Sections 7.1 and 7.2 (regarding mitigation plans), do not establish new development regulations but instead merely reflect existing law and a commitment by the County to apply that law. (Eg. "Mitigation plans may be developed for individual projects, for multiple projects in a reach of all of a tributary subbasin pursuant WAC 173-503-060(c).")[52]

A promise to enact a regulation is not itself a development regulation. As with the ILA under review in the Central Board case of *Burien v. SeaTac*, CPSGMHB Case No. 98-3-0010, the 2007 ILA between the County and Ecology influences but does not dictate the form, substance and timing of some of the proposed amendments. It is not, itself, a development regulation, and is therefore not subject to this Boards' review. The Court of Appeals, in reviewing that decision, agreed that the ILA in Burien was not a GMA action over which the Board had jurisdiction.[53]

V. FINDINGS OF FACT

1. Skagit County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.
2. In April of 2001 the Department of Ecology adopted Chapter 173-503, the Skagit Basin Instream Flow Rule (IFR).
3. Skagit County appealed the IFR to Thurston County Superior Court pursuant to the Administrative Procedures Act.
4. In November 2004 Ecology announced its intention to amend the IFR and in 2006 Ecology and Skagit County reached an agreement under which Ecology adopted an amendment to the Skagit County IFR.

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[52] 2007 ILA at Section 7.1.
[53] *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn.App. 375, 53 P.3d 1028 (2002).

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5. Skagit County agreed to dismiss its appeal of the IFR and to make a good faith effort to implement the IFR.
6. In January 2007, the County and Ecology entered into the 2007 ILA to implement the Skagit River IFR.
7. On January 22, 2007 Skagit County and the State of Washington Department of Ecology entered into an Instream Flow Implementation Agreement pursuant to RCW 39.34, the Interlocal Cooperation Act (the "2007 ILA").
8. Among the recitals of the 2007 ILA is that the County and Ecology would seek to exercise their respective regulatory authority in a coordinated and complementary fashion. Specifically, the parties agreed to work together on compiling data that will inform implementation decisions, to consult with each other on the management of reservations, to consult with interested parties on the accounting of water use under reservation, and to consult with each other on development of mitigation guidelines and plans.
9. On February 14, 2007 Petitioner City of Anacortes filed a Petition for Review challenging the County's and Ecology's entry into the 2007 ILA, alleging that it constituted a *de facto* amendment of the County's Comprehensive Plan that was inconsistent with that Plan and not adopted in accordance with the requirements of the Growth Management Act; alleging that the 2007 ILA adopted development regulations are inconsistent with GMA procedural requirements and the Comprehensive Plan; and alleging that the adoption of the 2007 ILA violated procedural requirements of the State Environmental Policy Act (SEPA), RCW 43.21C. On March 16, 2007 the City filed an Amended Petition for Review.
10. Prior to the adoption of the 2007 ILA, in late 2006, the City, the County, Ecology, and other parties had entered into a Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes ("1996 MOA").

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11. The 1996 MOA, the Skagit County Coordinated Water System Plan, Regional Supplement, July 1993 (CWSP) and the City of Anacortes' and PUD #1 of Skagit County's Joint Operating Agreement (Joint Operating Agreement) have been adopted as part of the Skagit County Comprehensive Plan.
12. The stated purposes of the 1996 MOA are: a) to ensure the establishment of instream flows to protect fisheries resources, and the mitigation of any interference with such established flows; b) to provide a mechanism for the coordinated management of water resources in areas described by the Skagit County Coordinated Water System Plan, Regional Supplement, July 1993 (CWSP) to meet the out-of-stream needs of the Swinomish Indian Tribal Community, Upper Skagit River Tribe, and Sauk-Suiattle Indian Tribe, local governments, and public water purveyors within Skagit County; c) to avoid litigation or adjudication of water resources within the Skagit River Basin between the parties to the agreement; d) to assist in expediting Ecology's water right decision-making within the CWSP service area; and e) to modify the CWSP to conform to the agreement and to incorporate the agreement into the City of Anacortes' and PUD #1 of Skagit County's Joint Operating Agreement.
13. Section 5.3 of the ILA provides that the County will establish "an advisory committee on the use of water under the Skagit River mainstem and sub-basin management units, and on other water resource issues in the Skagit River basin."
14. Section IV(G)(4) of the MOA establishes the body that will "guide the development, review and approval of Skagit River Watershed Management strategies". Under the CWSP, this committee became the Skagit County Water Utility Coordinating Council (WUCC).
15. It has not been demonstrated either that the County has abandoned its commitment to participate in the WUCC or that Anacortes will not be invited to participate as a member of the Advisory Committee. On the face of the two agreements, there is no necessary conflict between the two provisions.

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16. It is premature to argue that the Section 5.3 Advisory Committee "supplants the WUCC" since it will not be established until July 1, 2007 and the County has asserted its willingness to have the City participate on the Advisory Committee.
17. Consultation with Skagit County, as set out in Section 5.2, is not inconsistent with and does not foreclose the collaboration the parties to the 1996 MOA agreed to.
18. Section 6.3 of the ILA which provides that the County and Ecology will jointly fund a USGS study on groundwater in the Skagit River Basin does not effectively amend the County's comprehensive plan. The absence of a provision for such a process does not mean there will not be one.
19. Section 8.3 of the ILA specifically "reaffirms" the 1996 MOA. Rather than evidencing an intent to amend or supercede the MOA, the ILA expressly acknowledges its continuing effect and that the ILA is to be read in harmony with the MOA.
20. There is nothing in the 2007 ILA that explicitly or implicitly conflicts with or supercedes the Skagit County Comprehensive Plan.
21. Section 5.2 of the ILA provides:

> "Upon a basin closure, any land use or building permit application requiring a determination of water availability will be approved by Skagit County only if the applicant satisfies the mitigation requirements of the Skagit County Code, the Instream Flow Rule, and other applicable law."

22. It is the existing Instream Flow Rule, at WAC 173-503-051, rather than Section 5.2 of the ILA that provides for closure of basins to future use once reservations are used up.
23. Sections 7.1 and 7.2 (regarding mitigation plans) of the ILA, do not establish new development regulations but instead merely reflect existing law and a commitment by the County to apply that law.
24. The 2007 ILA between the County and Ecology does not dictate the form, substance and timing of the proposed amendments to the County's development regulations.
25. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby adopted as such.

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VI. CONCLUSIONS OF LAW

A. The Board has jurisdiction over the parties to this case.

B. The Board lacks subject-matter jurisdiction over the petition for review because the 2007 Interlocal Agreement between the County and the Department of Ecology is not a *de facto* comprehensive plan amendment.

C. The Board lacks subject-matter jurisdiction over the petition for review because the 2007 Interlocal Agreement between the County and the Department of Ecology does not adopt *de facto* development regulations.

D. Any Conclusion of Law hereafter determined to be a Finding of Fact is hereby adopted as such.

VII. ORDER

Having reviewed the arguments of the parties, the Motion for Summary Judgment is GRANTED and the above captioned matter is hereby DISMISSED.

The City's motion to strike the declarations attached to the County and Ecology's Motions for Summary Judgment is granted as to the declarations of Christensen and Browning, and denied as to the declaration of Swenson.

The City's motion to strike extra-record evidence submitted as Exhibit A to the City's Response to the City's Motion to Supplement the Record is granted.

Entered this 2nd day of July, 2007.

_____
James McNamara, Board Member

_____
Holly Gadbaw, Board Member

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_____
Margery Hite, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.
Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.
Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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